

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

JOSE LUIS GALLARDO-REGALDO,

Petitioner,

v.

3:06-cv-301
(3:03-cr-101)

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION

This is a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. The Clerk is **DIRECTED** to serve a copy of the motion and this Memorandum Opinion and accompanying Judgment Order on the United States Attorney. However, for the reasons stated below, the United States Attorney shall not be required to file an answer or other pleading to the motion, and the motion will be **DENIED**.

Petitioner pleaded guilty to drug charges, money laundering, and unlawful re-entry. Pursuant to an amended judgment, which granted the government's motion for reduction of sentence based upon substantial assistance, petitioner's sentence was reduced from 360 months to 250 month. Petitioner filed a motion for reconsideration and further reduction of

his sentence, which was denied. He then filed a notice of appeal as to the denial of his motion for reconsideration; the appeal remains pending. Less than a week after filing the notice of appeal, petitioner filed this § 2255 motion.

Absent extraordinary circumstances, a district court is precluded from entertaining a § 2255 motion while a direct appeal from the same conviction is still pending. *Capaldi v. Pontesso*, 135 F.3d 1122, 1124 (6th Cir. 1998). This case presents no extraordinary circumstances compelling district court review at this time. Accordingly, the motion to vacate, set aside or correct sentence will be **DENIED** and this action **DISMISSED**.

The court **CERTIFIES** that any appeal from this action would not be taken in good faith and would be totally frivolous. A certificate of appealability **SHALL NOT ISSUE**. 28 U.S.C. § 2253. The court will **DENY** the petitioner leave to proceed *in forma pauperis* on appeal. *See* Rule 24 of the Federal Rules of Appellate Procedure.

AN APPROPRIATE ORDER WILL ENTER.

s/ James H. Jarvis
United States District Judge